

AMERICAN ARBITRATION ASSOCIATION

In the Matter of the Arbitration Between

**FRATERNAL ORDER OF POLICE,
LODGE #5**

OPINION & AWARD

-- and --

**AAA No. 01-15-0004-9129
(P/O Arthur Herder)**

CITY OF PHILADELPHIA

ARBITRATOR: James M. Darby, Esq.

APPEARANCES: For the FOP:
Mark L. Gelman, Esq.
Jennings Sigmond, P.C.

For the City:
Benjamin Patchen, Esq.
City Solicitor's Office

This case arose when the City of Philadelphia (“the City”) Police Department (“the Department”) terminated Police Officer Arthur Herder (“the Grievant”) for conduct unbecoming. The Fraternal Order of Police, Lodge #5 (“the Union”) filed a grievance alleging that the City’s discipline action lacked just cause.

By letter dated September 15, 2015, from the American Arbitration Association (“AAA”), the undersigned was notified of his selection as Arbitrator

of this dispute. A hearing was held on April 26, 2016, at the AAA offices in Philadelphia, Pennsylvania, where the parties were afforded a full opportunity to present testimony, exhibits and arguments in support of their positions. The parties presented oral closing arguments in lieu of filing post-hearing briefs, and the record was closed. After fully considering all of the evidence and arguments presented, the matter is now ready for final disposition.

QUESTIONS TO BE RESOLVED

At the hearing, the parties stipulated to the following issue to be resolved by the Arbitrator:

Whether the City had just cause to terminate the Grievant, Arthur Herder? If not, what shall the remedy be?

REMEDY REQUESTED

The Union requests that the grievance be sustained, that the Grievant be reinstated and made whole, that his discipline be expunged from his record, and that the Arbitrator retain jurisdiction for purposes of resolving any remedial disputes.

FACTS

The Department hired the Grievant as a police officer in 1993. Since 2006, the Grievant has been suspended on three separate occasions and twice transferred for confrontational and/or threatening behavior towards co-workers. Additionally, in 2007 he received a 30-day suspension for vandalizing his wife's vehicle by throwing a brick through the window and a bowling ball onto the rear trunk. The Grievant received 30-day and five-day suspensions in 2012 for abusing his authority while off duty. (Joint Exhibit 2.)

Effective September 14, 2015, the City terminated the Grievant's employment for conduct unbecoming. Specifically, the Notice of Discipline states, in pertinent part, as follows:

Internal Affairs investigation sustained a criminal allegation against you in reference to an off duty incident on January 9, 2015. The facts and circumstances surrounding this incident determined that you directly communicated a crime of violence with the intent to terrorize J [REDACTED] S [REDACTED], as you, while operating your privately owned vehicle, threatened to 'put bullet holes' in him, 'fuck him up,' and 'shoot him next time' while in the area of Cottman and Central Avenues on the morning of January 9, 2015.

* * *

(Joint Exhibit 2.)

Specifically, the record shows that on the morning of January 9, 2015, high school senior J [REDACTED] S [REDACTED] and his girlfriend, high school senior M [REDACTED] I [REDACTED], were driving to school on Cottman Avenue. S [REDACTED] changed lanes to make a left-hand turn onto Central Avenue, a one-lane road. Before turning left, a white SUV

that was behind S█ drove around him in the opposing traffic lane and made the left turn before S█ could make his turn. S█ blew his horn then made his turn onto Central Avenue. The white SUV stopped his vehicle after entering Central Avenue, blocking S█ path.

The driver of the SUV got out of his vehicle, walked up to S█ driver-side window (which was cracked), cursed at S█ and threatened to shoot him (“put bullet holes in him”). The driver, who S█ and I█ both described as a large African-American male with a beard, then returned to his vehicle. Before entering his vehicle, he lifted up his shirt to reveal a handgun, and with his index finger and thumb proceeded to mimic a shooting motion towards S█. The man then got in his white SUV and drove away. The entire incident lasted only a few minutes.

The record shows further that I█ immediately recorded the license plate number (█) of the white SUV into her cell phone (City Exhibit 5).¹ After arriving at school, S█ and I█ reported the matter to the high school police officer, who recommended they speak to the Cheltenham Police Department. The Cheltenham Police Department determined that PA license plate █ was for a white Ford Expedition registered to the Grievant, who was on injury leave from the Department (Joint Exhibit 2).

¹ In the initial minutes after the altercation, when texting the license plate number to his mother, S█ mistakenly indicated the tag on the SUV was “█” (City Exhibits 1-2).

The Department's Office of Internal Affairs ("OIA") learned of the incident on January 20, 2015. On February 3, 2015, the Cheltenham Police Department informed OIA that it was not charging the Grievant with any crime absent receiving new information. OIA then conducted its own investigation and prepared a report concluding that it "was more likely than not" the Grievant engaged in the misconduct towards Scott as alleged. (City Exhibit 8.)

The findings were presented to the Police Board of Inquiry ("PBI") for further action. The PBI determined that the Grievant was guilty of Conduct Unbecoming, Sections 1-§001-10 (penalty range reprimand to dismissal); 1-§009-10 (10 days to dismissal); 1-§021-10 (30 days to dismissal); and 1-§026-10 (30 days to dismissal) of the Department's Disciplinary Code (Joint Exhibits 1-2). The PBI found the Grievant was guilty of all the charges, but recommended a 30-day suspension without pay on each charge for a total of 120 days. The recommendations were presented to Police Commissioner Ramsey, who terminated the Grievant. (Joint Exhibit 2.)

S█, who now attends Temple University, testified regarding the altercation with the Grievant. He recalled that the Grievant threatened to "put bullet holes in me" and then "lifted up his shirt flashing a gun and made a gun motion and pretended to shoot at me." S█ stated that the Grievant had a "fluffy" grey beard, and his vehicle was a white SUV with slightly tinted windows. He described the Grievant's demeanor as "aggressive" and "loud" and testified

that he (S █) was scared. S █ also described how OIA showed him a picture of the Grievant's white SUV, which he confirmed was the vehicle involved in the altercation on January 9, 2015 (City Exhibit 3). At the instant hearing, S █ pointed to the Grievant as the man who threatened him.

On cross-examination, S █ testified that the only thing he said to the Grievant during the altercation was to "keep going" and that he needed to get to school. He recalled that the Grievant had a grey beard, but averred that he told the PBI that the Grievant had a "black or grey-ish" beard.

I █ testified she also attends Temple University. She recalled the morning in question when the driver of the SUV was "yelling and cursing" at S █, claiming that he had a child in the car and "pointing to his gun." I █ stated that the driver was a large African-American man with a "puffy" black beard. His tone was "threatening" and she was scared. I █ continued that the driver lifted his shirt before getting back in his car and "showed us his gun and then made a gun motion," by raising his hand from his waist and pointing with his index finger and thumb. When asked if the man was in the hearing room, I █ testified that the Grievant did not look like the driver from the altercation on January 9, 2015.

OIA Investigator Lieutenant Brian Hartzell explained the steps he undertook to investigate the January 9, 2015, incident after the Cheltenham Police Department chose not to file criminal charges against the Grievant. He

determined that the license plate of the car involved belonged to the Grievant and both S█ and I█ identified a picture of the vehicle as the car involved in the incident. Hartzell also stated that neither S█, nor I█ could identify the Grievant from photo lineups presented to them initially by the Cheltenham Police Department and later by Hartzell (City Exhibit 6). After considering all of the evidence gathered, Hartzell concluded that the Grievant was the person involved in the altercation with S█, and that his conduct constituted a “terrorist threat” under §2706 of the Pennsylvania Crimes Code (City Exhibit 9).

Prior to starting its case-in-chief, the Union made an Offer of Proof, to which the City stipulated, that the Grievant’s son, were he to testify, would state that he recalled being driven to elementary school by the Grievant sometime around January 15, 2015. He would also testify that he has no recollection of being in the Grievant’s vehicle when it stopped, the Grievant exited the vehicle, and then subsequently returned to it.

The Grievant testified that every day in 2015 he drove his (now) █ son to elementary school in his white Ford Expedition. He averred that he was not involved in any altercations near the area of Cottman and Central Avenues during the first several weeks of January 2015. The Grievant stated that he used Cottman Avenue to take his son to school, but always turns left on Byers Road before reaching Central Avenue. He stated he was not involved in the incident described by S█, and could not recall what he specifically did on January 9,

2015. The Grievant testified further that at the time of the alleged incident he wore a grey, blue and orange football jacket, weighed about 220 pounds (about 10 pounds lighter than his present weight), and had a grey goatee.²

On cross-examination, the Grievant testified that the picture identified as City Exhibit 10 was actually taken on December 7, 2014. He added that Byers Road is in the area of Central Avenue, and that it eventually runs into Central Avenue. The Grievant stated that no one else was driving his vehicle during the timeframe of January 9, 2015, and that he owns his own firearm.

DISCUSSION

The parties' positions can be briefly summarized.

The City maintains that it had just cause to terminate the Grievant for conduct unbecoming. It argues that the only question before the undersigned is whether the incident occurred. The Grievant admits to owning the vehicle in question, that he was only a block away from the incident, and that he owns a firearm. The City dismisses any claim that S█ is not credible because he changed his description as to the color of the Grievant's beard. Whether it was "grey" or "grey-ish black" is not material and, in any event, is not inconsistent.

² The Grievant produced a picture of himself taken on December 14, 2014. It shows him with what appears to be a closely cropped grey goatee. (Union Exhibit 2.) The City introduced a picture of the Grievant posted on Facebook on December 21, 2014, in which he is sporting a closely cropped grey full beard (City Exhibit 10).

The City also maintains that the fact S█ got the number of the Grievant's license plate number wrong in his text to his mother is also immaterial. I█ was able to document the correct license plate number at the time of the event. The City stresses that S█ and I█ were very honest, even to the point of I█ claiming at the hearing that she could not identify the Grievant as the driver of the white SUV. The Grievant engaged in threatening behavior in the past, and the policies he violated all individually permit dismissal as a penalty.

The Union asserts that the City has failed to meet its burden of showing that it had just cause to terminate the Grievant. It submits that the appropriate standard of proof should be "beyond a reasonable doubt" or "clear and convincing evidence," inasmuch as the City is accusing the Grievant of committing a crime. The Union claims that in this case the eyewitness testimony and the vehicle information cannot carry the City's burden in the face of the Grievant's staunch denials. None of the charges against the Grievant mandate his dismissal. Even the PBI, after hearing testimony and evaluating all of the evidence, determined that the allegations only warranted a suspension without pay.

The Union contends that it cannot determine if S█ and I█ were untruthful or just mistaken. However, the record shows that they both originally described a person with a "puffy" or bushy beard. The record shows that the Grievant's facial hair was closely cropped at the time of the incident and that he

had a goatee – not a bushy beard. The Union also points out that I [REDACTED] has consistently stated the driver of the SUV had a black beard, while the record shows that, at all material times, the Grievant had a grey beard. It notes that both S [REDACTED] and I [REDACTED] also described the driver as “heavy,” while the Grievant is not overweight.

The Union also insists that while S [REDACTED] identified the Grievant as the driver of the SUV, I [REDACTED] did not. Thus, the two eyewitnesses themselves cannot agree on who the driver was. The Union also contends that they could not identify the Grievant in two separate photo lineups.

The undersigned must determine whether the City had just cause to terminate the Grievant for conduct unbecoming when he allegedly threatened a high school student during a driving incident.

While neither side expressly characterizes it as such, this case involves an allegation of “road rage.” Almost daily we read stories about road rage incidents, where drivers inexplicably (and often with little provocation) ratchet up their anger and disproportionately overreact in response to discourteous drivers. The perpetrators commit these acts knowing full well that they can easily be tracked down by their license plate tags. In some cases, the responses shockingly result in severe injury or even death. It is a serious, pointless, and preventable crime.

At the outset, I conclude that the January 9, 2015, road rage incident described by S█ and I█ occurred as they described. There is absolutely no evidence, nor any serious argument made by the Union, that S█ and I█ fabricated this incident. In this regard, I find that there is no conceivable reason why two high school (now college) students would expend significant time over the last year and a half submitting to numerous interviews and appearing at multiple hearings solely to further a prank. My observation is that they were obviously disturbed by this event and were fulfilling their obligations as good citizens to cooperate with and assist law enforcement's investigations in getting to the bottom of this frightening incident.

Hence, the only issue to resolve is whether the City has shown by a preponderance of the evidence that it was the Grievant who threatened S█ and I█.³ The undersigned concludes that it has.

During the incident, I█ recorded the SUV's license plate number. It is undisputed that the license plate number is a direct match with the Grievant's tag, as well as the make and model of his vehicle. During the investigation S█ identified the Grievant's vehicle as the SUV that stopped him on Central Avenue. Additionally, at the hearing S█ identified the Grievant as the man who threatened to shoot him. Moreover, the Grievant admits that: 1) he

³ The Union's request to impose a more strenuous burden of proof is denied, since only one of the four charges against the Grievant requires the City to prove the commission of a crime.

was only a couple of blocks away at the time of the incident; 2) he eventually gets on Central Avenue when driving to his son's school; 3) no one else used or drove his car; and 4) he owns a firearm.

With respect to credibility, as set forth above there is no evidence that S█ and I█ had anything to gain by reporting what they did. To the contrary, the Grievant has a clear motive to be untruthful, insofar as he has a disciplinary history evincing a pattern of threatening, belligerent behavior, both on and off duty. Moreover, the Grievant became somewhat agitated and defensive when counsel for the City peppered him with questions as to the route he takes when driving his son to school. These were valid questions that the Grievant made patently clear he was not comfortable answering.

The City's case is not flawless. S█ and I█ were unable during the investigation to pick the Grievant out of photo lineups, and I█ indicated at the hearing that the Grievant did not look like the man who threatened S█. In this regard, the clarity and resolution of the pictures presented to S█ and I█ were less than ideal. In carefully reviewing these pictures, I was also unable to decisively determine which one was the Grievant, who was sitting only a few seats away from the undersigned.

Moreover, regarding I█ inability at the hearing to recognize the Grievant as the driver of the white SUV, the evidence shows that the incident happened very quickly and over a year prior to the instant hearing. The Grievant

approached S [REDACTED] side of the vehicle, not the passenger side where I [REDACTED] was seated. Also, I [REDACTED] was clearly nervous and uncomfortable testifying. She became particularly so when asked by counsel to point out the individual who threatened them. I cannot ignore the distinct and reasonable possibility that I [REDACTED] was intimidated by the Grievant's presence in the hearing room when asked to identify him.

The Union focuses on S [REDACTED] and I [REDACTED] inability to consistently identify the color and length of the Grievant's beard, which the Grievant contends was a goatee at the time of the incident. Had I [REDACTED] not captured the license plate belonging to the Grievant, who was undisputedly driving a white SUV in the same neighborhood where the altercation occurred, the precise color and length of the Grievant's beard might be more material.

In any event, the record shows that in December 2014 the Grievant was wearing short facial hair short in both a goatee and full beard style. It had a blackish-grey "salt and pepper" appearance. As such, the beard could have easily been observed as being either black or grey. Additionally, without conducting a study on the speed at which the Grievant's facial hair grows, I cannot rule out the possibility that the Grievant's beard was longer at the time of the incident in January 2015.

Accordingly, based on the totality of all of the foregoing evidence and circumstances, the undersigned concludes that it is more likely than not that the

FOP Lodge 5 and Phila.
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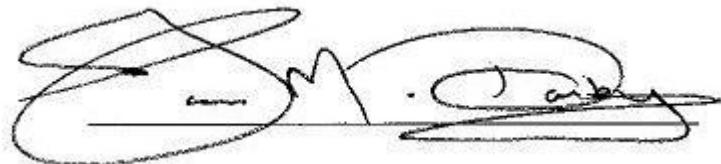
Grievant was the person who engaged in the incident described by S█ and I█. His actions violated Sections 1-§001-10; 1-§021-10; and 1-§026-10 of the Department's Disciplinary Code. Based on his prior discipline and the language of the Disciplinary Code, he was clearly on notice that another proven incident of conduct unbecoming could result in his termination. For this reason, the undersigned will not second-guess the Commissioner's determination that dismissal was the appropriate penalty in this case. The grievance is denied.

Consistent with the foregoing discussion and findings, the Arbitrator renders the following

AWARD

The grievance is denied.

The City had just cause to terminate the Grievant, Arthur Herder.

A handwritten signature in black ink, appearing to read "James M. Darby". The signature is fluid and cursive, with "James" on the left and "M. Darby" on the right, enclosed in a stylized oval.

JAMES M. DARBY
Arbitrator
Lancaster, Pennsylvania
October 14, 2016